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G & T Terminal Packaging Co., Inc. and Mr. Sprout, Inc. and Tray Wrap, Inc., and Chain Trucking Inc., a single employer, and G & T Terminal Packaging Co., Inc., and Its Alter Ego Slow Pack, Inc. and Paper Products and Miscellaneous Drivers, Warehousemen, Helpers and Messengers, Local 27, International Brotherhood of Teamsters, AFL-CIO, now known as Private Sanitation Union Local 813, International Brotherhood of Teamsters, affiliated with the AFL-CIO and Denny Lopez. Cases 2-CA-26738, 2-CA-27745, 2-CA-28364, and 2-CA-28360

November 30, 2010

SECOND SUPPLEMENTAL DECISION
AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On October 19, 2006, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent and the General Counsel each filed exceptions and a supporting brief. The General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs,¹ and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified below, and to adopt the recommended Order as modified and set forth in full below.

As set forth fully in the judge's decision, the Board remanded this case to him on November 24, 2004, to consider certain backpay issues raised by the United States Court of Appeals for the Second Circuit in *NLRB v. G & T Terminal Packaging Co.*, 19 Fed.Appx. 16 (2d

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Cir. 2001).² Except as noted here, we agree with the judge's backpay determinations for 22 discriminatees whom the Respondent unlawfully discharged in April 1995 when closing its potato packaging machine operation and transferring the work performed on that operation to another company.³ In particular, absent any credible evidence to the contrary, we find that the judge reasonably concluded that the Respondent would have closed down its potato packing machine operations for legitimate economic reasons no earlier than January 31, 1996, that all of the discriminatees were qualified to perform other packing work for the Respondent, and that their backpay periods should be determined by reference to seniority.⁴ We also affirm the judge's determination that the Respondent's liability to the Union's Pension Fund should include annual interest at the rate of 7.8 percent,⁵ and his calculations of amounts due for discriminatees' dental and optical expenses.⁶

We also agree with the judge, for the reasons he states, that backpay for Maria Garcia should extend from the date of her discharge through January 31, 1996, and should resume for the period of October 1, 1996, through the second quarter of 2003. Garcia never received an

² See also *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103 (2d Cir. 2001).

³ We make the following corrections to the judge's calculations:

Sabina Cabrera	earning—\$176/week; total backpay—\$5,354
Erlinda Espinosa	earning—\$176/week
Mercedes Garcia	earning—\$176/week
Primitivo Lopez	backpay for Q2 1995—\$1,680
Leonardo Morel	backpay cutoff—2/21/96; backpay for Q1 1996 \$1,680; total backpay—\$7,260
Jose Rafael Ortega	total backpay—\$15,500
Claudio Santiago	total backpay—\$13,330
Leyda Triunfel	backpay for Q2 1995—\$1760

We also add the following discriminatees to be awarded the indicated amounts of total backpay:

Estefania Acevedo	\$600.00
Ramona Escaboza	140.80
Francisco Rodriguez	126.00

⁴ Our disposition of the issues raised with respect to the sufficiency of all discriminatees' interim jobs searches is consistent with *St. George Warehouse*, 351 NLRB 961 (2007), which issued subsequent to the judge's supplemental decision, since the Respondent failed to show that there were substantially equivalent jobs within the relevant job market.

⁵ We modify the judge's determinations of Pension Fund liability, based on the Respondent's payments of \$124,216, for the years 1993 through 1998 as follows:

For 1993	\$0.00
For 1994	0.00
For 1995	0.00
For 1996	8,535.62
For 1997	24,112.00
For 1998	\$23,864.00

⁶ We do not rely on the judge's conclusion that the Welfare Fund was providing benefits to the Respondent's employees until March 1, 1996.

offer of reinstatement. The evidence shows that the Respondent, although it had Garcia's last known address, mailed her reinstatement offer to the wrong employee at the wrong address, and that it made no effort to verify the accuracy of its mailing. The cases cited below by our dissenting colleague, are distinguishable. In each, the employer correctly mailed the reinstatement offer to the employee's last known address, but the offer was never received for reasons apparently beyond the employer's control. In these circumstances, we find here that the Respondent, as the wrongdoer, has not established an objective justification for shifting the burden of its error to Garcia.⁷

As of the date of the hearing on remand, the Region was unable to locate discriminatee Matilda Rodriguez. The judge incorrectly found that no claim was made on her behalf, when in fact the General Counsel claims \$13,200 as the gross amount of backpay due her. To afford the General Counsel an opportunity to locate Matilda Rodriguez and ascertain her interim earnings, we shall order the Respondent to pay this discriminatee's specified gross backpay to the Regional Director for Region 2 to be held in escrow for a period not to exceed 1 year. That 1-year period shall begin when the Respondent deposits the backpay into escrow or on the date this Second Supplemental Decision and Order becomes final, including enforcement thereof, whichever is later. Should the Regional Director determine that deductions are warranted, the amount so deducted shall be returned to the Respondent and the remainder paid to the discriminatee. In the event that the General Counsel, at the end of the 1-year escrow period, has failed to locate Matilda Rodriguez, her award shall lapse and her full gross backpay amount shall be returned to the Respondent. *Starlight Cutting*, 280 NLRB 1071 (1986), order amended by 284 NLRB 620 (1987); NLRB Casehandling Manual (Part Three) Compliance, Sections 10582.3, 10584.

⁷ Member Hayes would modify discriminatee Maria Garcia's backpay period to the date of discharge through January 31, 1996. He disagrees with the judge's finding that her backpay should resume for the period of October 1, 1996, through the second quarter of 2003. The Respondent attempted to mail a valid reinstatement offer to Garcia, but mistakenly sent the offer to the address of a similarly-named employee, Martina Garcia. The record does not show that the Respondent knew or had reason to know that its offer was not received by Maria Garcia. In these circumstances, Member Hayes finds that, although Garcia never received an offer of reinstatement, the Respondent's good-faith effort to communicate to her a valid offer of reinstatement on October 1, 1996, was sufficient to toll the backpay period. *Performance Friction Corp.*, 335 NLRB 1117, 1118 (2001), citing *Burnup & Sims*, 256 NLRB 965 (1981); *Hagar Management Corp.*, 323 NLRB 1005, 1007 (1997).

ORDER

The Respondent, G & T Terminal Packaging Co., Inc. and Mr. Sprout Inc. and Tray Wrap Inc., and Chain Trucking, Inc., as a single employer, and G & T Terminal Packaging Co., Inc., and its alter ego, Slow Pack, Inc., Bronx, New York, their officers, agents, successors, and assigns, shall make payments in the manner described below, with interest.⁸

The backpay amounts owed are as follows:

Sabina Cabrera	\$5,354.00
Antonio Castillo	14,700.00
Marcos Delgado	14,834.00
German Diaz	13,010.00
Erlinda Espinoza	13,200.00
Maria Garcia (Now Carmen Dominguez)	67,936.00
Mercedes Garcia	8,712.00
Ana Hernandez	13,200.00
Estate of Casimiro Hernandez	15,540.00
Denny Lopez	16,950.00
Primitivo Lopez	15,330.00
Leonardo Morel	7,260.00
Beatriz Olivo	7,216.00
Benita Olivo	7,216.00
Juana Olivo	7,216.00
Jose Rafael Ortega	15,500.00
Carlos Santana	13,480.00
Claudio Santiago	13,330.00
Leyda Triunfel de Nelson	7,216.00
Estefania Acevedo	600.00
Ramona Escaboza	140.80
Francisco Rodriguez	126.00
<u>Matilda Rodriguez</u>	<u>13,200.00</u>
Total	\$291,266.80

The amount due Matilda Rodriguez shall be paid to the Regional Director for Region 2 to be held in escrow for a period not to exceed 1 year. The 1-year escrow period shall begin upon the Respondent's compliance by payment of the backpay for deposit into escrow or the date that the Board's Second Supplemental Decision and Order becomes final, including enforcement thereof, whichever is later.

⁸ Interest on all amounts owed shall be computed in the manner prescribed by *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except that, as stated, the interest rate on amounts owing to the Union's Pension Fund shall be 7.8 percent.

The amounts due the Pension Fund are as follows:

For 1996	\$8,535.62
For 1997	24,112.00
For 1998	23,864.00
For 1999	23,320.00
For 2000	12,104.00
For 2001	19,744.00
For 2002	16,824.00
For 2003	17,976.00
For 2004	19,766.00
For 2005	17,515.00
Total	\$183,760.62

The amounts due for unreimbursed dental and optical expenses are as follows:

Nancy Amparo	\$144.00
Ramona Escaboza	365.00
Nicholas Ramos	465.00
Thelma Severino	2,149.00
Total	\$3,123.00
Total Backpay	\$478,150.42

Dated, Washington, D.C. November 30, 2010

Wilma B. Liebman,	Chairman
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Margit Reiner, Esq. and Joane Wong, Esq., for the General Counsel.

Linda Strumpf, Esq. and Sarah R. Smetana, Esq., for the Respondent.

George A. Kirschenbaum, Esq. and Edmond V. Pendleton, Esq., for the Charging Parties.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. A supplemental hearing in these cases was held on various dates in August 2005 and in April, May, and June 2006.

Case 2-CA-26738 involves a backpay specification after the Board issued an unpublished Decision and Order on July 15, 1994. In that case, the Respondent was ordered to make whole employees by making contributions, with interest, to the Welfare Trust Fund and the Pension Fund as required under the terms of the Employer's collective-bargaining agreement with the Union effective from November 1, 1989, through October

31, 1992. The Court of Appeals for the Second Circuit enforced the Board's Order on September 20, 1994. In this regard, the Respondent had ceased making payments to those funds on January 1, 1993.

The backpay specification also asserted that the number of employee to be made whole on account of the Respondent's failure to make fund payments should not only include the particular employees who were actually employed in the bargaining unit during the periods of time that such payments were not made, but also a set of 22 additional employees who were illegally discharged on April 17 and 19, 1995.¹

Finally, the backpay specification in Case 2-CA-26738 alleged that the backpay and interest continued to run until the Respondent complied with the underlying Board and court Order.

The other cases, Cases 2-CA-27745, 2-CA-28364 and 2-CA-28360, involved new and separate allegations, which can be summarized as follows:

1. That G & T Terminal Packaging Co., Inc. along with a group of related companies (Mr. Sprout, Inc., Chain Trucking Inc., Tray Wrap Inc., and Slow Pack Inc.), constituted a single employer.

2. That despite reaching a full and complete agreement on June 10, 2004, the Respondent, since April 14, 1995, refused to execute the agreement.

3. That on April 17, 1995, the Respondent discharged a group of employees because they engaged in a concerted protest regarding the Respondent's refusal to execute the aforesaid agreement.

4. That on April 17, 1995, the Respondents, unilaterally and without bargaining with the Union, and for discriminatory reasons, transferred its potato-packaging machine to another company.

5. That on April 19, 1995, the Respondent, for discriminatory reasons, refused to reinstate all of the employees that it had discharged on April 17, 1995.

6. That in May 1995, the Respondent, in order to discourage union membership, granted raises to certain of its employees.

I heard those cases on various days in December 1995 through March 1996 and issued a decision on September 9, 1995.

On August 20, 1998, the Board issued its Decision and Order in those cases at 326 NLRB 114. Basically, the Board affirmed most of my earlier conclusions including my recommendation that (a) the Respondent, upon the Union's request, execute the agreement reached on June 10, 1994; (b) that the Respondent reinstate the employees who were illegally discharged and not thereafter reinstated; and (c) that the Respondent, which had, on April 17, 1995, unilaterally transferred the potato packaging machine to a company called M & M because of antiunion reasons,² be ordered to restore that operation.³

¹ The parties agreed on the amounts owing to Estafania Acevedo, Romana Escaboza, and Francisco Rodriguez. I will therefore not discuss their claims.

² In my original decision and based on the testimony of G&T's owner, I concluded that G&T had at a minimum continued to make, after the discharges on April 17, 1995, 40 to 60 percent of its previous potato sales through M & M after the potato-packaging machine was

In addition to adopting the backpay award in the old case (Case 2–CA–26738), the Board adopted the make-whole remedy for the violations found in the other and newer unfair labor practice cases. The remedy for these new cases included the obligation to make the employees whole, with interest, for the difference between what they actually earned and what they should have earned by virtue of the new contract, including payments to the funds set out in the new collective-bargaining agreement that ran for a fixed term retroactive from October 1, 1992, to September 30, 1995, with automatic renewals from year to year thereafter in the absence of a reopening.

On March 14, 2001, the Second Circuit Court of Appeals issued a decision in *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, that partially granted enforcement of the Board's Decision. However, the court made the following statements:

1) We DENY enforcement insofar as the Order requires the Company to reinstate its potato-packaging operation and to rehire the 22 employees who used to operate the potato-packaging machine, and REMAND to the Board with instructions to arrive at a remedy that will effectuate the general reparative policies of the Act by making the employees whole without imposing an undue burden on the employer;

2) We DENY enforcement insofar as the Order requires the Company to pay specific amounts to the pension and welfare fund, and REMAND to the Board for recalculation of these amounts consistent with this opinion; and

3) We DENY enforcement insofar as the Order requires the Company to pay 18 percent interest on the amounts owed to the pension and welfare funds and REMAND to the Board for further development of the record on this matter.

Before reaching these conclusions, the court made a number of subordinate findings, which I think are relevant to the remand.

The court noted that although G & T's owner, Anthony Spinale, claimed that a group of employee (22 in number), were discharged on April 19, 1995, for the legitimate reason that the Company no longer had any potato-packaging work for them to do, the judge (me), had ample reason to discredit his testimony and to conclude that Spinale's decision to dismantle the machine and send the parts to M & M on April 17, 1995, was motivated by the indication that the Union was serious about pressing him to sign a contract. As noted by the court, "the record supports the ALJ's conclusion that the Company failed

dismantled and sent to M & M. I also found, based on Spinale's testimony, which otherwise was evasive and untrustworthy, that at some point in May 1995, he resumed some potato packaging by hand. The court noted, however, that at oral argument, counsel for the Respondent insisted that the Company had resumed only about 5 percent of its pre-April 17, 1995 potato packaging operation. Such an assertion was never made at the original hearing and the testimonial admissions by the Respondent's owner were to the contrary.

³ Although finding that the Respondent, on April 19, reinstated 30 of the protesting workers, the Board and the reviewing court concluded that the Respondent did so without regard to seniority.

to demonstrate by a preponderance of the evidence," as it must, "that it would have done what it did, *when it did*, in the absence of the [employees'] union activities." "In short, the evidence in the record adequately supports the ALJ's finding that a group of employees was discharged on April 17, 1995 and not rehired as a result of its protected activities."

The court concluded that the Respondent also violated the Act by not recalling the employees discharged on April 19, 1995, in order of seniority. It rejected the Respondent's argument that it had no obligation to rehire in order of seniority because the parties' inability to reach an agreement meant that there was no seniority clause in effect. Having concluded that the parties had reached a contract, which the Respondent unlawfully refused to execute, the court stated: "[W]e do not disturb the conclusion that the company violated the Act by rehiring employees without regard to seniority."⁴

Notwithstanding the conclusions that the 22 employees were illegally discharged and illegally passed over for reinstatement because of a breach of the seniority provisions of the contract, the court refused to enforce that portion of the Board's Order that required the Company to restore the potato-packaging operation and to rehire the 22 illegally fired employees. In so doing, the court stated:

In short the Company has demonstrated by a preponderance of the evidence that to purchase a new machine and reinstate the potato-packaging operation would be unduly burdensome; such a machine would impose a financial burden on G&T so large as to render the firm virtually unprofitable, and would simply not fit in the Company's existing facility. On these combination facts, we deny the Board's petition for enforcement of its order insofar as it requires the Company to reinstate the potato-packaging operation. For the same reasons, we decline to enforce the order insofar as it requires the Company to rehire the 22 employees who worked in the potato-packaging operation. Since we have concluded that reinstatement of the potato-packaging operation would be unduly burdensome to the Company we cannot expect it to rehire the 22 affected employees to perform the operation. Accordingly, we remand the cause to the Board for consideration of an alternative means of providing a remedy that will effectuate the "general reparative policies of the Act" . . . by "making the employees whole for losses suffered on account of the unfair labor practice" . . . without proving "unduly burdensome to the employer. . . . The instant case presents an analogous situation, because the record supports *both* the finding that the employees' protected activities motivated the dismantling of the potato-packaging machine on April 17, 1995, *and* the conclusion that reinstatement of the operation would have been unduly burdensome, if not immediately after the dismantlement, then soon thereafter—and, in any event, long before the hearing before the ALJ. . . . Counsel for the company indicated at oral argument that the affected employees never received any back pay, and conceded that some amount of back pay could provide a reasonable substitute for the unduly bur-

⁴ In this respect, the Company's failure to follow contract seniority in recalling employees, not only would constitute a violation of Sec. 8(d) and (a)(5) of the Act, but would also be a breach of contract.

densome remedy of buying a new potato-packaging machine and reinstating the entire operation. . . . We agree. However, we also recognize that the Act “vest[s] in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act”. . . . Accordingly, we remand to the Board for reconsideration of the remedy, with instructions that it impose a make-whole remedy that provides a reasonable substitute, under the circumstances, for that which we have found unduly burdensome.”

With respect to fund calculations, the court concluded that the Respondent could not challenge the judge’s calculation of the backpay amounts, but could challenge the judge’s calculation of the interest due on the amounts. The court also noted that because it refused to enforce the Order insofar as it requires the Company to reinstate the potato-packaging operation and rehire its 22 employees, this would affect the calculation of the amounts owed to the benefit funds, “beginning on whatever date the Board reasonably determines that reinstatement of the operation would have proved unduly burdensome to the employer.” The court further stated that the Board’s calculation of moneys owed to the pension and welfare funds “must assume that the 22 employees discharged on April 19, 1995 would have worked only through a date to be determined by the Board; after such date, the calculation of the amounts owed should no longer include these 22 in the total number of employees.”

As to the interest rate, the court stated; “We decline to enforce the Order insofar as it imposes this award of interest, and remand for further development of the record concerning what would be an appropriate rate. Although the Board has broad discretion in fashioning remedial orders, its orders may not cross the line that divides the remedial from the punitive. . . . The record before us is insufficiently developed for us to determine whether the 18 percent interest rate bears some reasonable relationship to the actual losses suffered by the funds due to the company’s underpayments, or whether it amounts to a punitive measure against the company.”

Subsequently, the Board asked for a rehearing and argued that the record showed that at least 9 of the 22 discriminatees had experience in packaging tomatoes and sprouts and that the record was silent as to the other 13. The General Counsel also argued that since the court held that the Respondent had illegally failed to follow contract seniority in reinstating employees on April 19, 1995, some of the 22 discriminatees should have been recalled if they had more seniority than others who were recalled on April 19, 1995. On September 25, 2001, the court granted the Board’s petition and remanded the issue to the Board to consider whether reinstatement and backpay remedies are feasible and equitable at this time. *NLRB v. G & T Terminal Packaging Co.*, supra, 246 F.3d 103.

After soliciting position statements, the Board, on November 24, 2004, issued a Supplemental Decision that remanded these cases to me.⁵ In part, the Board concluded; “We find that reinstatement and backpay remedies for the 22 discriminatees are indeed feasible and equitable.” The Board stated that “discriminatees who were qualified to package tomatoes and Brus-

sels sprouts should have been recalled if they had more seniority than the other employees who had been recalled on April 19, 1995. Thus, those discriminatees are entitled to reinstatement and backpay from the date of the unlawful discharge until a valid offer or reinstatement, replacing as necessary, employees hired after April 19, 1995 and employees who even if were recalled on April 19, 1995 had less seniority than employees who were not recalled.” The Board also stated that because the Respondent, in May 1995, resumed packaging some potatoes by hand and hired new employees to package vegetables, any of the 22 discriminatees who were qualified to package tomatoes, sprouts, or potatoes by hand, should have been recalled and therefore would be entitled to backpay from that date until a valid reinstatement offer is made.

The Board stated that if there are more remaining discriminatees than there were positions that became available in May 1995 or thereafter, the least senior discriminatees are entitled to receive backpay from the date of discharge up until the time when the potato-packaging machine would have been shut down in any event due to valid economic reasons. It concluded that those discriminatees are also entitled to be placed on a preferential hiring list as of the date that the judge determines that the potato-packaging machine would have been shut down.

As to any in the group of 22 who were not qualified to package tomatoes, brussel sprouts, or potatoes by hand (i.e., qualified only to work on the potato-packaging machine), the Board stated that they should receive backpay up until the time when the potato-packaging machine would have been shut down for economic reasons.

The Board stated that in making these determinations, the judge should consider the seniority status of all of the discriminatees, their qualifications, the positions that became available in May 1995 and, thereafter, and the date that the potato-packaging machine would have been shut down for valid economic reasons.

With respect to the base amount owed to the funds, the Board stated that the judge should determine the correct base amount owed to the funds. This would depend upon when I conclude that the Respondent would have shut down this operation for economic reasons.

As to interest, the Board stated: “[T]he judge should determine an interest rate that bears a reasonable relationship to the actual losses suffered by the Funds due to the Respondent’s underpayments. In making this determination, the judge should focus on the actual performance of the Funds during the period in question.”

I. THE BACKPAY PERIOD

In accordance with the remand, the first question that has to be answered is when is it probable that the potato-packing machine would have been dismantled and employees laid off despite the Employer’s unlawful motivation in terminating this operation in order to retaliate against employees who participated in a protected demonstration (and not a work stoppage), to protest the Employer’s refusal to execute a contract that it had made with their union representative. As the Board and the court of appeals have already concluded that the Employer’s actions, including its discharge of these 22 employees was ille-

⁵ The Board issued an amended Order on December 2, 2004.

gally motivated, it is obvious that the Respondent must bear the burden of proof in demonstrating when it would otherwise have shut down this operation in the absence of its illegal motivation.

The Respondent presented Spinale who testified that he had planned on shutting down the potato-packaging machine at the end of April 1995. He testified that he made his mind up about this decision as soon as the strike occurred because he was losing so much money.⁶ His testimony was that even though the labor problem precipitated the closing of the machine on April 17, 1995, he probably would have closed it the following week because he was "losing some big money." According to Spinale: "I guess I couldn't keep up with that kind of packaging and the cost that it cost me to pack a bag compared to M&M. It might cost me \$2.00 and it cost M&M like \$.80. So it didn't pay."

I didn't believe Spinale's testimony back in 1995 and I don't believe his testimony now.

The General Counsel argues that at the earliest, Spinale would have dismantled the potato-packaging machine on January 31, 1996. This would be 9-1/2 months after the illegal discharge that took place on April 17, 1995.

Among the reasons why the court of appeals was willing to accept the Respondent's position was the Company's assertion that (a) the machine was old (obviously correct); (b) that Spinale and his accountant testified without contradiction that the potato packaging operation suffered continuous monthly losses over a long period of time; (c) that Spinale was in poor health; and (d) that a new machine would not fit into the space rented by the Respondent. With respect to the assertion that the potato packaging operation was suffering from continuous monthly losses, the court, while acknowledging that even though the Respondent's records showed that G&T's operations were profitable in 1994 and 1995, it concluded that this was the result of Spinale's manipulation of his accounting records which [falsely] shifted expenses from G&T to Tray Wrap, another company that he owned.

As to reason (c), I must say that Spinale, who again testified about 10 years later, seemed to be in remarkably good physical condition and was mighty feisty. I should only look so good at his age.

In the remand hearing, Spinale's testimony was that he was losing about \$10,000 to \$15,000 each month on the potato-packaging operation and was aware that M&M could do it for a lot less money per pound. He testified that he therefore decided to contract out that part of the operation to M&M while keeping only a limited type of potato packing operation. In the latter regard, Spinale testified that he continued to package by hand, the five potatoes in a sleeve and the 5 pound bags made for Shop Rite because they required a uniform size of potato of good quality. In these instances, Spinale testified that this type of hand packaging was very profitable.

There is no dispute that the potato-packaging machine was old and was not the most efficient way of packaging bulk potatoes into 5- and 10-pound packages. Moreover, I don't think that the General Counsel is really disputing Spinale's assertion

that M&M could do the same operation at a lower cost. But the fact that Spinale's cost of packing potatoes would be higher if he did it himself than if he contracted it out, does not mean that his business was losing money at the time that he decided to dismantle the machine.

Spinale's assertion that he was losing \$10,000 to \$15,000 per month on packaging potatoes, aside from not being documented, is really beside's the point. *Those numbers do not represent any net losses to the enterprise.* The cost of labor in operating the packaging machine is an expense and by definition is a negative when calculating net profit. (The same as the price of rent or the cost of diesel fuel to operate one's trucks.) The goal of Spinale's business is to sell potatoes at a profit and Spinale's testimony indicates to me that the profit is largely dependent on timing the market. That is, his goal is to buy potatoes when they are cheap and sell them when they are dear. The packaging of potatoes, either by hand or machine, is a cost of doing business that although obviously important, is not the only or even the most decisive factor in making a profit. Potato packaging isn't a separate business from selling potatoes.

In trying to determine a date when Spinale would have closed down the potato-packaging machine for legitimate non-discriminatory economic reasons, the General Counsel is relying on the testimony of G&T's accountant, Robert Falk, and on various documents including General Counsel's Exhibit 60. This exhibit consists of three separate "Statement of Operations" documents for G&T Terminal Packaging Co., Inc.

The first is a statement regarding the month of December 1994 and the 12 months ending December 31, 1994, which summarizes, on a year to date basis (a) the cost of sales (including wages, produce, freight, inspection, M&M services, etc.) (b) the gross profit, (c) various expenses such as legal, utilities, rent, limo, bank charges, etc., (d) operating profit, and (e) dividend and interest income. This shows that for the year ending December 31, 1994, G&T had a net profit of \$184,126. It also shows that G&T had a net profit for the month of December in the amount of \$18,056.

The second is a statement of operations for G&T showing that for the year ending December 31, 1995, it had a net profit of \$103,918. It also shows that for the month of December 1995 G&T had a net profit of \$91,411.

The third is a statement of operations for G&T showing that for the 3 months ending March 1996, G&T had a net loss of \$51,582 and that for the month of March 1996 it had a loss of \$61,130. This means that all of the loss for this quarter was incurred in March 1996.

I did not believe Spinale when he testified at the first hearings that he decided to close the packaging-machine operation because he was losing money. And I don't believe his testimony now that he would have closed the operation by the end of April 1995.⁷

⁶ I again note that there never was a strike by the employees in this case.

⁷ I note that the General Counsel subpoenaed the Company's statements of operations for January, February, and March 1995 in order to check Spinale's assertion that G&T was unprofitable immediately before Spinale decided to dismantle the machine. These documents plus the Company's tax returns for 1995 were not provided and the respondent asserted that they were no longer available. In this regard, the General Counsel notes that as the crux of the Respondent's defense

As it is my opinion that the Respondent has not carried its burden of showing that it would have dismantled the potato-packaging machine by the end of April 1995, I will accept the General Counsel's concession that the Company might have terminated this operation by the end of January 31, 1996.

In concluding that there is a probability that the potato-packaging machine would have been dismantled for legitimate economic reasons, no earlier than by January 31, 1996, the backpay period for all of the employees would therefore run from April 20, 1995, until January 31, 1996.⁸

The Respondent mailed offers of reinstatement to former employees and with the exception of Maria Garcia (now Carmen Dominguez), they all received these offers on or about October 1, 1996. Thus, except for Maria Garcia (discussed below), the General Counsel has cut off the backpay period for these people as of October 1, 1996.

In accordance with the Board's Supplemental Decision dated November 24, 2004, the General Counsel posits that with respect to those of the 22 discharged individuals who had less seniority than those employees who either remained employed or were recalled on April 19 1995, their backpay would be cut off as of January 31, 1996. However, as to those of the 22 who had more seniority and who were qualified to do the other jobs available at the Respondent, this second group would be entitled to backpay until they either returned to work or received reinstatement offers from the Respondent.⁹ Thus, as to this second group (with the exception of Maria Garcia, their maximum period for backpay would be October 1, 1996.

I conclude that all of the 22 discriminatees were qualified to perform all of the packaging and other functions that were performed by the Respondent and that there were no jobs that were done after April 19, 1995, that were beyond the capabilities of these people.

The Respondent employs a group of completely unskilled workers to do unskilled work. They pack potatoes, tomatoes, and brussel sprouts which are put onto trucks for delivery to the Respondent's customers. To a certain extent, some of the work is divided into men's and women's work in that the men tend to do the heavier work of moving larger bundles, whereas the women are the people who put the potatoes, tomatoes, or sprouts into smaller containers. The vegetables come into the premises in large lots and are then brought by the men to tables where the women sort and pack them. Potatoes are placed into five-pound bags or sleeves containing five potatoes each. Tomatoes are put into packages that are then sealed with a plastic wrap. And brussel sprouts are also placed into small containers, which are then wrapped in plastic wrap. The packages of each type of vegetable are then consolidated onto pallets and then moved by the men to the loading dock. Of these operations, the packaging of brussel sprouts seems to require some

minimal extra aptitude because the Employer expects the employees to work fast and they do so in cold conditions.¹⁰ But none of these operations require any skill or training and they are, as far as I can see, completely interchangeable. The credible testimony by the various employees who gave evidence on this subject was that they have, in the past, done some or all of these functions and have not been required to undergo any type of training that lasted more than 1 day.

Based on the record as a whole, I conclude that all of the 22 discriminatees had the necessary skills and/or aptitude to do any of the job functions that existed at the Respondent's facility after the potato-packaging machine was dismantled. I therefore conclude that they could have been reinstated to other available jobs. The only question is whether they had sufficient seniority.

The Respondent was unable to produce records showing the hiring dates of the employees who were employed during the periods before and after April 19, 1995. Accordingly, Esther Morales, a regional office compliance employee was asked to construct, to the extent possible, a list showing the seniority of the retained and discharged employees as of April 19, 1995.

Morales started from the fact that on April 17, 1995, Spinale told 62 out of his 77 workers that they were fired. (Fifteen employees were not discharged.) Of the group of 62, all but 24 people were recalled on or before April 19. Two employees, Francisco Rodriguez and Ramona Escaboza were reinstated respectively on April 23 and 25, 1995. This leaves us with 22.

To determine the seniority of all of these people, Morales utilized Respondent's records to the extent that they existed, billing records that the Union sent to the Respondent, affidavits taken from employees when possible and responses to questionnaires that she sent out to employees at their last known addresses. Although this may not have been perfect, I conclude that Morales' effort was appropriately undertaken and has, in the absence of definitive company records, produced as close an approximation of seniority standing as would be possible.

The question is which of the 22, based on seniority and skills, should have been reinstated between the period after the machine was dismantled (i.e., from February 1 until October 1, 1996), when the offers of reinstatement were received by everyone except Garcia. Because the Board's Remand Order implied that the 15 individuals who were not discharged on April 17, 1995, could not be bumped, the General Counsel has invested them with a kind of super seniority.¹¹ Therefore, the General Counsel, through Esther Morales, made a chart that listed the number of people actually employed by the Respondent during each week during the period from February 1 to October 1, 1996, and subtracted 15 from each week's number. For example, if the net number for a particular week was 47 (the actual number of employees minus 15), then if 1 of the 22 discriminatees had a seniority number of 47 or lower, it was

was its lack of profitability, it is surprising that the Respondent has failed to retain documents that would buttress its argument.

⁸ During the hearing, I granted the General Counsel's motion to amend so that the specification would show that the backpay period commenced on April 20, 1995.

⁹ The parties agreed that Estefania Acevedo was owed \$600 and that Romana Escoboza was owed \$141. I expect that these amounts have already been paid per agreement.

¹⁰ Brussel sprouts, unlike tomatoes and potatoes, are seasonal. The season runs from about October through January.

¹¹ Since the collective-bargaining agreement called for seniority to be used for layoff and recall purposes, I don't understand why the employees who were not discharged on April 19, 1995, were excluded for purposes of determining recall based on seniority. But that is water under the bridge and not subject to this litigation.

assumed that he or she would have been employed during that week. On the other hand, if that discriminatee's seniority number was 48 or higher, then it was assumed that this person would not have sufficient seniority to be recalled. After the end of February 1996, the total number of people actually employed by the Respondent was 60 or 61 and therefore the net was 45 or 46.

Based on these factors, the General Counsel contends and I agree that the following individuals should have their backpay cut off as of January 31, 1996:

Sabrina Cabrera
Beatriz Olivo
Benita Olivo
Juana Olivo
Leyda Triunfel (now known as Leyda Triunfel de Nelson)

I also conclude that the following discriminatees should have their backpay cut off only as of October 1, 1996:

Sabrina Cabrera
Antonio Castillo
Marcos Delgado
German Diaz
Erlinda Espinoza
Mercedes Garcia
Ana Hernandez
Casimiro Hernandez
Denny Lopez
Primitivo Winston Lopez
Jose Merigildo¹²
Rafael Ortega
Matilda Rodriguez¹³
Carlos Santana
Claudio Santiago

As noted above, Maria Garcia's situation is different. And the reason is that she never actually received the October 1, 1996 offer of reinstatement that was sent to all of the other discriminatees. While I have no doubt that the Respondent intended to send reinstatement offers to all of the discriminatees, the evidence shows that it sent an offer to a person named Martina Garcia who lived at a different address than Marcia Garcia. Thus, by mistake, the letter was sent to the wrong person at the wrong address. As such, the offer was never sent to Garcia at her last known address and obviously was never received by her. Nor is there any evidence that the Respondent made any efforts to ascertain her whereabouts or to double check to make sure that the offer was sent to the right person.

¹² In the brief, the General Counsel advised me that Merigildo had told the Region, after the trial had been completed that he had removed himself from the labor market and had not looked for work. The General Counsel therefore has deleted this claim.

¹³ This person could not be located. Consequently, the General Counsel is not making a present claim on her behalf. In the event that she can be located, an inquiry would have to be made as to her search for work and any interim earnings that she had. In the worst case scenario, in the event that the parties could not agree, we would have to reopen this case to determine what if any net backpay was owed to this individual, assuming that she was located.

The next question is whether she should have been employed after January 31, 1996, based on her seniority. Garcia was number 59 on the reconstructed seniority list and therefore she would not have had sufficient seniority to be employed after January 31, 1996, when the potato machine would have been dismantled for nondiscriminatory reasons.

Nevertheless, the General Counsel argues that even though Garcia would not have been subject to recall between February 1 to October 1, 1996, she would have been eligible for recall on or after October 1, 1996, when jobs opened up. Inasmuch as 21 offers of reinstatement were made on October 1 1996, 21 jobs were made available as of that date.¹⁴ Of this group, 13 people did not accept the offers and did not return to work. Therefore, this means that there were at least 13 available jobs, one of which could have been done by Garcia if she had received the reinstatement offer.

The General Counsel argues, and I agree that the backpay for Marcia Garcia, although initially ceased on January 31, 1996, resumed on October 1, 1996, and ran until the second quarter of 2003 when she turned 65 and stopped looking for work.

II. THE BACKPAY FORMULA

There is no dispute regarding the hourly rates of pay for the discriminatees. For most, the hourly rate was stipulated and the General Counsel points out that even to the extent that the stipulation did not cover certain individuals, the hourly rate used by the Respondent in its answer with respect to Sabrina Cabrera, Marcos Delgado, Casimiro Hernandez, and Primitivo Lopez are the same as used by the General Counsel in the appendices to the backpay specification. The only real differences are their respective contention regarding (a) the number of hours worked per employee per week (yielding a weekly rate) and (b) the duration of the backpay period. (I have already discussed and decided the backpay period.)

The General Counsel contends that the gross backpay should be based on each employee's hourly rate of pay multiplied by 40 hours per week. In my opinion, the evidence shows that this formula is reasonable.¹⁵ Indeed, it is my opinion that the General Counsel's formula tends to favor the Respondent.

Pursuant to the agreed upon collective-bargaining agreement, the standard workweek was 40 hours with overtime to be paid at the rate of 1-1/2 times for hours worked after 40 hours.

Obviously there is a problem reconstructing the amount of hours these employees normally worked during 1995. (Before their discharge.) For one thing, there are insufficient payroll and/or timecard records. For another, the recollection of the witnesses regarding the hours that they worked more than 10 years ago can only be approximate. Nevertheless, the testimony of witnesses who were queried on this subject was that the employees started their day at 8 in the morning and continued until their work was finished, often late into the evening.

¹⁴ In order to be a valid offer of reinstatement, the employer's offer has to be genuine.

¹⁵ The Board has "broad discretion" to shape or choose a formula designed to best approximate what the discriminatees would have earned but for the illegal action against them. *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977); *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963).

Many of the employees testified that they worked numerous overtime hours. For his part, Spinale testified that during the main part of the sprout season (from October through January), employees worked 4 or 5 overtime hours *per day*. He testified that during the remaining part of the year, the employees worked 5 days per week and that they rarely worked less than 6 to 7 hours a day. Spinale further testified that other busy times during the year were the weeks before Thanksgiving and Christmas.

Given the lack of documentary evidence and based on the testimony of employees and Spinale, it seems to me that using a 40-hour week is reasonable. It may be that there were times during the year when employees might have worked less than 40 hours per week. But that is more than offset by evidence showing that for at least 4-1/2 months per year, employees worked substantial amounts of overtime for which they would have been paid at 1-1/2 times their normal rates of pay. Further, the Respondent produced no evidence to rebut the General Counsel's contentions.¹⁶

III. NET BACKPAY FOR EACH INDIVIDUAL

Before discussing each of the discriminatees, I want to make some initial observations.

These employees are for the most part foreign born and speak English, if at all, as a second language. Most have extremely limited educational attainment and all have been employed by the Respondent to do unskilled work. When they were discharged, they did not have the command of job or language skills that would have made them eagerly sought after in the job market. Most obtained unemployment insurance benefits although some apparently were not even aware that such benefits were available to them. Some of these individuals were forced to move out of their homes and many had to rely on the charity of relatives and friends. Although no one suffered starvation, it is clear to me that many of these people were put under a great burden as a result of being illegally discharged.

The Respondent challenged the way that the Region conducted the backpay investigation, asserting that it did not comport with the guidelines set forth in the Board's Casehandling Manual, Compliance Section. The Respondent asserts that the Regional office had a duty to advise the claimants of their obligations to seek work; that it had an obligation to maintain contact with these discriminatees over the 10-year period after their discharge; and that it had the duty to advise them of their responsibility to keep records.

Whether or not the Regional's staff fully followed the NLRB's Casehandling Manual in this old and extremely difficult case is, when all is said and done, completely irrelevant. The Regional employees who conducted the backpay investigation were not, and cannot be considered to be the discrimina-

tees' agents. As such whatever they did or did not do to determine backpay has absolutely no bearing on the employees' rights to backpay. *Houston Building Services*, 321 NLRB 123, 130 (1996), *enfd.* 128 F.3d 860 (5th Cir. 1997).¹⁷

The General Counsel has, at various times, amended the backpay specification. This was done as new information was received. For the most part, and with the exception of Maria Garcia, these amendments have tended to lower the backpay claims. To avoid confusion, I note that a set of numbers was given on November 2005 and that these were amended on March 23 and April 18, 2006. Moreover, there were some final amendments made before the close of the hearing and even in the General Counsel's brief. (All of which I grant.)

The general principles governing backpay claims are well settled. The finding of an unfair labor practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), *cert. denied* 384 U.S. 972 (1966). Once the General Counsel has shown the gross backpay due in the specification, the employer has the burden of establishing affirmative defenses which would mitigate his liability, including willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); see also *Sioux Falls Stock Yards Co.*, 236 NLRB 543 (1978).

Respondent does not meet its burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of so-called "incredibly low earnings," but must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (5th Cir. 1966).

In meeting this burden, the Respondent cannot merely rely upon cross-examination of the claimant and allegedly impeaching testimony. *NLRB v. Inland Empire Meat Co.*, 692 F.2d 764 (9th Cir. 1982). The evidence must establish that during the backpay period there were sources of actual or potential employment that the claimant failed to explore and must show if, where, and when the discriminatee would have been hired had they applied. *Id.* at 1308; *McLoughlin Mfg. Corp.*, 219 NLRB 920, 922 (1975); *Isaac & Vinson Security Services*, 208 NLRB 47, 52 (1973). *Champa Linen Service Co.*, 222 NLRB 940, 942 (1976). In this connection, the fact that some of the discriminatees in this case failed to look for similar jobs in the Hunt's Point Market is no defense. *Associated Grocers*, 295 NLRB 806 (1989); *Marlene Industries*, 234 NLRB 285, 289 (1978).

Although a discriminatee must make reasonable efforts to mitigate her loss of income, she is held only to reasonable exertions, not to the highest standard of diligence. *NLRB v. Arduini Mfg. Co.*, 384 F.2d 420, 422-423 (1st Cir. 1968); *Otis Hospital*, 240 NLRB 173, 175 (1979). Nor is a discriminatee required to pursue his or her job search by any specific method or by a method that the respondent thinks would have been more successful. All that is required is a reasonable search for work. *United*

¹⁶ Although Mercedes Garcia testified that she worked, on average, about 32 to 35 hours per week, it is obvious to me that this estimate about her situation 10 years ago should not detract from the other evidence that tends to show that all employees averaged at least 40 hours per week. The same should be the case for Benita Olivo, whose average weekly hours were affected by the fact that she was out of work for about 2 months for the birth of a child.

¹⁷ In *Superior Industries*, 289 NLRB 834 *fn* 13 (1983), *enfd.* 902 F.2d 40 (9th Cir. 1990), the Board stated that the Casehandling Manuals do not provide a form of binding legal authority and are merely guidelines to the NLRB's staff in how to administer the Act.

States Can Co., 328 NLRB 334 (1999), enfd. 254 F.3d 626 (7th Cir. 2001); *Continental Insurance Co.*, 289 NLRB 961 (1982).

Success is not the measure of the sufficiency of the discriminatee's search for employment. The law only requires an "honest, good-faith effort." *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). A discriminatee is not required to apply for each and every possible job that might have existed in the industry, or even to apply for work during each and every quarter. *Champa Linen Service*, 222 NLRB at 942; *Madison Courier, Inc.*, 202 NLRB 808, 814 (1973); *Sioux Falls Stock Yards*, 236 NLRB at 551; *Cornwell Co.*, 171 NLRB 342, 343 (1968). What constitutes reasonable efforts depends upon the circumstances of each case, an examination of the entire backpay period, not upon a purely mechanical examination of the number or kind of applications for work made by the discriminatees. *Cornwell Co.*, supra; *Mastro Plastics Corp.*, 136 NLRB at 1359. In determining the reasonableness of this effort, the employee's skill, qualifications, age and labor conditions in the area are factors to be considered. *Id.* However, even where the evidence raises doubt as to the diligence of the claimant's efforts to gain employment, it is the discriminatee who must receive the benefit of the doubt rather than the Respondent wrongdoer whose conduct has created the situation creating the uncertainty. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d at 572-573; *Neely's Car Clinic*, 255 NLRB 1420, 1421 (1981); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982); *Otis Hospital*, 240 NLRB at 174.

The Board has found that poor record keeping, uncertain memory and even exaggeration do not necessarily disqualify an employee from receiving backpay. *Kansas Refined Helium Co.*, supra at 1159; *Sioux Falls Stock Yards*, supra at 559-560; *United States Can Co.*, supra at 342. Further, it is neither unusual nor suspicious if a discriminatee cannot accurately recall details of a work search undertaken several years before. *United Aircraft Corp.*, 204 NLRB 1068 fn. 4 (1973).

The Board and the courts have held that it is not enough that the respondent thinks that employees should have been able to secure jobs. "Suspicion and surmise are no more valid bases for decision in [the] backpay hearing than in an unfair labor practice hearing." *Laidlaw Corp.*, 207 NLRB 591, 594 (1973), enfd. 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975).

A Respondent cannot meet its burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of "incredibly low earnings, but must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work."

Finally, the fact that a discriminatee rejects a job offer is not, by itself, sufficient to toll backpay if the job offered is not substantially equivalent to the job lost. Thus, if the offered job pays significantly less money or if the conditions of employment are significantly more onerous, a discriminatee's refusal to accept that offer "does not evidence a willful loss of employment requiring the termination of or a seduction in his backpay." *Arlington Hotel Co.*, 287 NLRB 851, 852 (1987).

A. Sabrina Cabrera

The General Counsel claims that Cabrera's gross backpay is \$1408 for Q2 1995 (8 weeks); \$2288 for Q3 1995; \$2288 for Q4 1995; and \$800 for Q1 1996. The General Counsel asserts that she had no interim earnings.

As of April 17, 1995, Cabrera was in the Dominican Republic and when she tried to return to work on May 1, 1995, she was refused. Her backpay therefore starts on May 1, 1995. At the time of her discharge, her average earnings were \$126 per week and since she was number 56 on the seniority list, the General Counsel concedes that her backpay should cease as of January 31, 1996. (She returned to work at G&T after receiving the October 1, 1996, offer of reinstatement.) She testified that after May 1, 1995, she received unemployment benefits for 9 months.

The Respondent has not shown that Cabrera has failed to make a reasonable search for work. However, Cabrera conceded that she was offered a job as a cook for \$275 per week at a restaurant that was about four blocks from her home. She testified that the offer was for a job that was for 6 days a week and that it would have required her to work until 9 p.m. Cabrera testified that the reason she didn't accept this job was because she had to pick up her children by 4 p.m. Nevertheless, she also testified that when she worked at G&T she often had to work anywhere from 7 to 10 p.m. According to Cabrera, she was offered this job before Christmas of 1996 and perhaps sometime after Thanksgiving.

I conclude that Cabrera refused an equivalent job and that her backpay should be cut off as of the time that she refused this job.¹⁸ Accordingly, I will reduce her gross backpay in Q4 1995 from \$2288 to \$1658. I am also going to reduce her gross backpay in Q1 1996 to \$0.

I find that Cabrera's net backpay is \$4854 plus interest.

B. Antonio Castillo

The General Counsel's amended claim for Antonio Castillo is \$14,700. The General Counsel claims that Castillo's gross backpay for Q2, 1995 (10 weeks) is \$2100; for Q3 1995, \$2730; for Q4 1995, \$2730; for Q1 1996, \$1680; for Q2 1996, \$2730; and for Q3 1996, \$2730.

At the time of his discharge, Castillo was earning \$210 per week. He was number 16 on the seniority list and therefore had sufficient seniority to be reinstated after January 31, 1996, when the potato packaging machine would have been dismantled for nondiscriminatory reasons. Therefore, his backpay would terminate as of October 1, 1996, when he received an offer of reinstatement.

Castillo testified that he waited for about 3 weeks before he began his search for work, but this short delay is no reason to deny him backpay for that period. *Rainbow Coaches*, 280 NLRB 166, 192 (1986). According to Castillo, he received

¹⁸ The evidence indicated that the weeks before Christmas were usually pretty busy at G&T. Therefore, I think that it is reasonable to conclude that during this time, there probably would have been a good deal of overtime and that Cabrera would have been required to work until at least the early evening.

unemployment benefits for 3 months and relied on charity to support himself.

Castillo testified that he was in the hospital for a period of time but couldn't remember when that was. Hospital records showed that he was in a hospital in February 1998, which is outside the backpay period. This therefore cannot affect his claim.

According to Castillo, he went to Santa Domingo at some point after April 19, 1995. Since he could not recall when this was, I told him to send his passports to the General Counsel, which he did. Esther Morales (a compliance specialist for the Region), testified that she reviewed the submitted passports which showed that Castillo entered that country on January 3, 1996, but did not indicate when he returned to the United States. She also reminded me that Castillo had testified in the underlying case on March 8, 1996, and therefore had to have returned before that date. Based on this set of facts, the General Counsel asserts, and I agree that it is reasonable to assume that Castillo was not available for work from January 3, to about the third week in February 1996. But as Castillo was entitled to a 2-week vacation, and there was evidence that employees could take their vacation whenever they desired, the General Counsel calculated that Castillo's net backpay for Q1 1996, should be reduced by a total of 5 weeks; from \$2730 to \$1680.

As the Respondent has not, in my opinion, shown that Castillo was unavailable for work at any other time or that he had otherwise failed to mitigate his damages, I conclude that he is owed \$14,700 plus interest.

C. Marcos Delgado

The General Counsel's amended claim for Marcos Delgado is \$14,834. The General Counsel claims that Delgado, whose weekly earnings were \$210, had gross backpay of \$1890 in Q2 of 1995 (9 weeks) and gross backpay of \$2730 in each of the next five quarters.

At the time of his discharge, Delgado was number 13 on the seniority list. He collected unemployment benefits for 6 months and he returned to work when he received the Respondent's October 1996 reinstatement offer.

In the original specification, the General Counsel had listed interim earnings of \$1794 in Q1 of 1996 and \$276 in Q2 of that same year. This was based on a questionnaire that Delgado submitted to the Regional Office. Nevertheless, at the hearing, Delgado testified that the only job he worked at after his discharge and before his reinstatement, was at a company called Viele Manufacturing Corp. Delgado testified that he worked at this company for about 5 or 6 weeks and this was confirmed by pay stubs that he submitted at the hearing. (Showing that he earned \$705 for the year of 1996.) Based on this, the Region amended the specification to assert that his interim earnings during the backpay period were \$705 during the third quarter of 1996.

As the Respondent has not demonstrated that Delgado had any other interim earnings,¹⁹ that he rejected equivalent em-

ployment, that he was unavailable for work, or that he failed in any other manner to mitigate his losses, I conclude that it owes Delgado \$14,834, plus interest.

D. German Diaz

In the last amended specification, the General Counsel reduced this claim from \$15,750 to \$13,010. This amendment was made to reflect a larger amount of interim earnings.

As of the date of discharge, Diaz was earning \$210 per week and was number 24 on the seniority list. Diaz testified that he did not collect any unemployment insurance benefits and that he lived with his grandmother and received charity from his mother and cousin. For Q2 1995 (10 weeks), the claim is for \$2100 and for the remaining quarters through Q3, 1996, the gross backpay claim is for \$2730 per quarter.

Diaz testified that after April 19, 1995, he helped out his cousin in order to learn how to repair cars. He testified that he thought that his cousin started to pay him around September 1996. But in interview notes that Morales took, he told her that he started to get paid about \$80 to \$100 in cash, per week, in February 1996. In any event and despite the ambiguity of the evidence concerning his earnings 10 years ago, the General Counsel, in the final amended specification, credited Delgado with approximately \$90-per week during a portion of the first, second, and third quarters of 1996. (Starting around March 1, 1966, and not in September 1996.)

As the Respondent has not demonstrated that Delgado had other interim earnings, that he failed to search for work, that he was unavailable for work, or that he otherwise failed to mitigate his damages, I will accept the General Counsel's calculations that Delgado is owed net backpay in the amount of \$13,010, plus interest.

E. Erlinda Espinoza

The General Counsel's claim is for \$13,200. She is the wife of Danny Lopez, another discriminatee and she collected unemployment insurance benefits for 6 months. (She had no interim earnings.)

At the time of her discharge, Espinoza was earning \$170 per week and she was number 34 on the seniority list. The claim for Q2 1995 (10 weeks) is \$1760 and the claim for the remaining quarters through Q3 1996 is \$2288 for each quarter.

Espinoza conceded that in May 1995, she refused a job offer at a store called Mendoza Fruits. She testified that she refused this offer because the job paid \$150 for a 7-day week. According to Espinoza, she had a 1-year-old baby at the time and had she accepted the job, she would have had to pay a sitter a substantial percentage of what she earned. In any event, since the job offer at Mendoza fruit, which was for less pay and more work, than her job at G&T, I conclude that her refusal of this offer does not amount to a failure to mitigate.

Accordingly, as the Respondent has failed to demonstrate that Espinoza had other interim earnings, that she failed to search for work, that she was unavailable for work, or that she otherwise failed to mitigate her damages, I will accept the Gen-

¹⁹ In the questionnaire, Delgado indicated that he had been employed by G. D. Cary Plastic Packaging Corp. However, it is plain that

Delgado had help in filling out this questionnaire because he is substantially illiterate and it seemed probable to all counsel, including myself that he was referring to G&T Packaging and not some other company.

eral Counsel's calculations that she is owed net backpay in the amount of \$13,200, plus interest.

*F. Maria Garcia*²⁰

The General Counsel's last amendment (made on May 1, 2006), claims that the Respondent owes her at total of \$67,936. (In the penultimate amendment, the General Counsel's claim was for \$68,640; the difference being that the final claim gives the Respondent a credit for periods of 3 to 4 weeks in 1997, 1998, and 2002 when Garcia was out of the country.) This is, by far, the highest net backpay claim and it reflects that fact that the Respondent mistakenly mailed a reinstatement offer to another person and not to her.

At the time of her discharge, Garcia earned \$176 per week and was number 59 on the seniority list. This means that she did not have sufficient seniority to be reinstated after the potato-packaging machine would have been dismantled for legitimate business reasons on or about January 31, 2006. However, because the Respondent made 22 reinstatement offers to the employees who were discharged due to the machine's termination, one of which was not sent to her, this means that as of October 1, 1996, there was a job waiting for her had she received the offer.

In my opinion, the General Counsel correctly terminated Garcia's backpay as of February 1, 1996, but reinstated it after October 1, 1996. The General Counsel also determined that Garcia's backpay should again be cut off in the fourth week of Q2 of 2003 when she turned 65 and completely ceased looking for work. It is asserted that she had no interim earnings during the entire backpay period. Garcia testified that she started collecting social security benefits in or about 2000 when she was 62.

According to Garcia, she refused a job taking care of an elderly man when she was told by his son that this person tended to throw things like dishes when he got annoyed. Garcia also testified that at various times, she looked for work in Atlantic City, which is where one of her daughters lives. In this regard, Garcia testified that on one occasion in 1999, she was tentatively offered a cleaning job at a hotel but that she couldn't do the work because she couldn't bend over to make the beds. At that time, she would have been in her late 50s.

It is unfortunate for the Respondent that although it apparently intended to make an offer of reinstatement to Garcia, it failed to do so. For if that offer had been made, the backpay period would have terminated on February 1, 1996, and Garcia's net backpay would have been \$7216. But that is not her fault.

Concluding that the Respondent has not demonstrated that she had interim employment, that she refused to take an equivalent job, that she was unavailable for work, or that she otherwise failed to mitigate damages, I conclude that the Respondent owes Garcia backpay in the amount of \$67,936, plus interest.

G. Mercedes Garcia

The General Counsel's claim is for \$8712. At the time of her discharge, Mercedes Garcia was number 38 on the seniority

list and was earning \$170 per week. Therefore, her gross backpay for the second quarter of 1995 (10 weeks) was \$1760 and her gross backpay for the remaining period until October 1, 1996, was \$2288 per quarter. She collected unemployment insurance for 6 months and lived with her sister.

The evidence shows that after her discharge Garcia looked for work, albeit her search was somewhat impaired because she had a small child at home and had to pay a babysitter when she went out.²¹ Nevertheless, at the end of December 1995, she obtained a job in Brooklyn but was thereafter laid off in May 1996. The General Counsel concedes that Garcia had interim earnings of \$400 in the fourth quarter of 1995, \$2600 in the first quarter of 1996, and \$1800 in the second quarter of 1996.

Mercedes Garcia received Respondent's October 1, 1996 reinstatement offer but did not accept it.

In my opinion, the Respondent has failed to demonstrate that Mercedes Garcia had any other interim earnings; that she failed to search for work, that she was unavailable for work or that she otherwise failed to mitigate her damages. I will therefore accept the General Counsel's calculations that she is owed net backpay in the amount of \$8712 plus interest.

H. Ana Hernandez

The General Counsel claims that she is owed \$13,200. At the time of her discharge, Hernandez was earning \$176 per week and she was number 18 on the seniority list. Therefore her gross backpay for the second quarter of 1995 (10 weeks) was \$1760 and her gross backpay for the remaining period until October 1, 1996, was \$2288 per quarter. She testified that although she looked for work mainly through her friends, she was unable to find work.

At some point, Ana Hernandez conceded that she stopped looking for work because her husband, Casimiro Hernandez, became too sick and had to be tended.²² During the hearing, she could not remember whether this was in 1996 or 1997 and surmised that her husband was hospitalized in July or August 1996, which would be within the backpay period. Because of her confusion, the General Counsel obtained hospital records that showed that her husband was hospitalized on two occasions; once between December 11 and 15, 1996, and the second time between December 22, 1996, and January 10, 1997. Since both of these periods were after the October 1, 1996 offers of reinstatement, it is likely that Ana Hernandez stopped looking for work after the backpay period ended.

As the Respondent has failed to demonstrate that Ana Hernandez had any interim earnings that she failed to search for work, that she was unavailable for work during the backpay period, or that she otherwise failed to mitigate her damages. I will therefore accept the General Counsel's calculations that she is owed net backpay in the amount of \$13,200, plus interest.

²¹ Garcia had a second child on October 11, 1996.

²² Perhaps one could argue that being the primary caretaker of a sick spouse or relative should be deemed to be the equivalent of interim employment and should not be used to penalize a discriminatee. But that is not argued in the present case.

²⁰ After her discharge, Maria Garcia changed her name to Carmen Dominguez.

I. The Estate of Casimiro Hernandez

The General Counsel claims that the Respondent owes the estate of Casimiro Hernandez the sum of \$15,540. At the time of his discharge he was earning \$210 per week. For Q2 1995, (9 weeks) the claim is for \$1890 and for the remaining quarters through Q3 1996, the claim is for \$2730 per quarter.²³

His son testified that after Casimiro Hernandez was discharged, he took his father around to the Hunts Point Market and various stores to look for work. He never found employment. Since it is probable that Hernandez became too sick to work after receiving the October 1, 1996 reinstatement offer, I think that the General Counsel correctly calculated that his backpay period ran until that date.

As the Respondent has failed to demonstrate that Casimiro Hernandez had any interim earnings that he failed to search for work, that he was unavailable for work during he backpay period, or that he otherwise failed to mitigate his damages. I will therefore accept the General Counsel's calculations that his estate is owed net backpay in the amount of \$15,540, plus interest.

J. Denny Lopez

The General Counsel contends that Lopez is owed \$16,950. At the time of his discharge, he earned \$226 per hour. Therefore for Q2 1995 (10 weeks), the claim is for \$2260 and for the remaining time, the claim is for \$2938 per quarter. He was number 26 on the seniority list.

Lopez testified that he unsuccessfully looked for work during the backpay period. He testified that he collected unemployment insurance benefits for 6 months and received help from his relatives. Lopez testified that he returned to work at G&T when he got the reinstatement offer and worked there for about 5 months after October 1996.

The Respondent has not shown that Lopez failed to search for work; that he had any interim earnings, that he was unavailable for work, or that he otherwise failed to mitigate his damages. I therefore find that the Respondent owes him \$16,950, plus interest.

K. Primitivo Lopez

The General Counsel's claim is for \$15,330. At the time of his discharge, Primitivo Lopez was earning \$210 per week. For Q2 1995 (8 weeks),²⁴ the claim is for \$1280 and for the remaining time, the claim is for \$2730 per quarter. He was number 29 on the seniority list.

He received unemployment insurance benefits for 6 months. Primitivo Lopez testified that he unsuccessfully looked for work and lived with his mother.

As the Respondent has not shown that Primitivo Lopez failed to search for work; that he had any interim earnings, that he was unavailable for work, or that he otherwise failed to mitigate

his damages, I conclude that the Respondent owes him \$15,330, plus interest.

L. Leonardo Morel

The General Counsel's claim is for \$7260. As Morel was number 47 on the seniority list, his backpay should be cut off as of February 1, 1996. Based on his last rate of pay of \$210 per week, the General Counsel claims \$2100 for Q2 1995 (10 weeks); \$2730 as gross backpay for Qs 3 and 4, 1995; and \$1680 for Q1 1996. However, I calculate that the gross backpay amount should be \$1050 for the first 5 weeks of 1996 instead of an amount for 8 weeks of 1996.

Morel testified that he found a job in the third quarter of 1996. This paid \$5.50 per hour for 40 hours per week. According to Morel, he quit this job because the chemicals made him ill. Morel testified that after that job, he obtained another job at Silver Line in March 1996. The General Counsel calculated Morel's interim earnings at \$1980 during the third quarter of 1995.

As the Respondent has not sustained its burden of proof that Morel failed to search for work, that he had any other interim earnings, that he was unavailable for work, or that he otherwise failed to mitigate his damages, I conclude that the Respondent owes him \$6630, plus interest.

M. Beatriz Olivo

The General Counsel's claim is for \$7216. Because she was number 57 on the seniority list, her backpay would be cut off as of February 1, 1996. Therefore, based on her last pay rate of \$176 per week, her gross backpay would be \$1760 for Q2 1995 (10 weeks); \$2288 for the second and third quarters of 1995; and \$880 for the first 5 weeks of 1996.

Beatriz Olivo testified that after she was discharged by G&T, she searched for work without success. For example, she testified that on two occasions, she responded to help wanted signs but was not offered jobs because she could not speak English. She received unemployment insurance benefits for 3 months and testified that out of frustration, she moved to Massachusetts in order to look for work. During the backpay period, Beatriz Olivo was evicted from her apartment, moved in with a friend and relied on her parents and friends for support.

As the Respondent has not shown that Beatriz Olivo failed to search for work; that she had any interim earnings, that she was unavailable for work, or that she otherwise failed to mitigate his damages, I conclude that the Respondent owes her \$7216, plus interest.

N. Benita Olivo

The General Counsel's claim is for \$7216. She is number 48 on the seniority list and her gross backpay (cut off as of February 1, 1996), based on an income of \$176 per week, is calculated to be the same as her sister, Beatriz Olivo.

She testified that she unsuccessfully looked for work after her discharge and she moved to Massachusetts with her sister. She collected unemployment benefits for 3 months.

As the Respondent has not sustained its burden of proof that Benita Olivo failed to search for work; that she had any other interim earnings, that she was unavailable for work, or that she

²³ Casimiro Hernandez died on February 18, 1997, and according to his son, became seriously ill when he was first hospitalized which was about 6 months before his death.

²⁴ At the time of the discharges, Primitivo Lopez was in Santa Domingo. When he returned to the United States, he was not allowed to return to work.

otherwise failed to mitigate her damages, I conclude that the Respondent owes her \$7216, plus interest.

O. Juana Olivo

The evidence concerning Juana Olivo is more or less the same as her sisters, Benita and Beatriz. She was number 58 on the seniority list and therefore her backpay is cut off as of February 1, 1996. She testified that she received unemployment benefits for 3 months and that she unsuccessfully looked for work. In this latter respect, she testified that during this period, she earned a mere \$80 for a cleaning job but that it cost her \$125 to register for work. According to Olivo, she went onto welfare when her unemployment benefits ran out and she managed to get by from charity from her relatives. She also moved to Massachusetts with her sisters.

As the Respondent has not sustained its burden of proof that Benita Olivo failed to search for work, that she had any other interim earnings, that she was unavailable for work, or that she otherwise failed to mitigate her damages, I conclude that the Respondent owes her \$7216, plus interest.

P. Jose Rafael Ortega

The General Counsel's claim is for \$15,500. Ortega was number 27 on the seniority list and based on earnings of \$210 per week, the General Counsel calculated his gross backpay as \$2100 for Q2 1995 (10 weeks) and \$2730 for each quarter through Q3 of 1996.

Ortega testified that after his discharge he searched, without much success, for work at various stores, supermarkets, and restaurants. He testified that in December 1995, he did some construction work on an ad hoc basis for which he received \$50 a day in cash. Although Ortega initially did not tell the compliance officer about this "job" in which he earned about \$250 in Q4 1995, this clearly was inadvertent and not a willful failure to disclose his interim earnings to the Government. (The General Counsel amended the claim to include these interim earnings as an offset to Ortega's gross backpay.)

There also was a question about his availability for work during the backpay period because Ortega testified that for some time he was in Santo Domingo attending his mother's funeral. In his testimony he could not recall when that was, but he later provided a death certificate showing that she died on April 20, 1996. Ortega testified that he was in Santa Domingo for 2 weeks, but since the employees of G&T were entitled to 2 weeks of paid vacation per year, this trip would not reduce his net backpay.

Ortega received the Respondent's October 1, 1996 reinstatement offer and returned to work. However, he quit after 7 or 8 weeks.

As the Respondent has not sustained its burden of proof that Ortega failed to search for work; that he had any other interim earnings, that he was unavailable for work, or that he otherwise failed to mitigate her damages, I conclude that the Respondent owes him \$7216, plus interest.

Q. Matilda Rodriguez

The General Counsel could not locate this individual. Therefore, the General Counsel asks that it be allowed to reopen this case, in the event she is found, to ascertain her net backpay and

to afford the Respondent and opportunity to exam her on any relevant point. At the present time, no amount is claimed on her behalf.

R. Carlos Santana

The General Counsel's claim is for \$13,480. Santana is number 15 on the seniority list and based on his earnings of \$210 per week, the General Counsel calculates that his gross backpay is \$1680 for Q2 1995 (8 weeks),²⁵ and \$2730 for Q3 1995 and Qs 1, 2, and 3 of 1996. For Q4 of 1995, the General Counsel calculated that Santana was available for work for only 8 weeks and therefore his gross backpay was \$1680. During the backpay period, he received unemployment benefits for 5 months. He also received financial support from his adult sons.

Santana testified that he went back to the Dominican Republic for about 5 weeks during the latter part of 1995. The General Counsel therefore reduced his backpay period during the fourth quarter of 1995 to 8 weeks instead of 13 weeks. Santana also testified that in the latter part of 1995, he worked as a self-employed street mechanic and earned about \$800.

In my opinion, the Respondent has not shown that Santana failed to search for work, that he had any other interim earnings, that he was unavailable for work, or that he otherwise failed to mitigate his damages, I conclude that the Respondent owes him \$13,480, plus interest.

S. Claudio Santiago

The General's Counsel's claim is for \$13,330. Santiago was number 33 on the seniority list and based on his weekly earnings of \$210, the General Counsel calculates his gross backpay as \$2100 for Q2 1995 (10 weeks) and \$2730 for each of the following quarters through the third quarter of 1996. He never applied for unemployment insurance benefits and managed to get by with his savings, financial help from his brother and the little money that he earned from intermittent jobs.

The General Counsel calculated that Santiago had interim earnings during each quarter during the backpay period that ranged from a low of \$60 to a high of \$920.

The Respondent has not shown that Santana failed to search for work, that he had any other interim earnings, that he was unavailable for work, or that he otherwise failed to mitigate his damages. I therefore conclude that the Respondent owes him \$13,480, plus interest.

T. Leyda Triunfel

The General Counsel's claim is for \$7216. Triunfel was number 49 on the seniority list and therefore her backpay was cut off as of February 1, 1996. Based on her weekly earnings of \$176, the General Counsel calculated her gross backpay at \$1750 for Q2 1995 (10 weeks), \$2288 for Qs 1 and 2 1995, and \$880 for the first 5 weeks of 1996.

During the backpay period, Triunfel was provided with room and board by her brother. Like any other long-term guest, she

²⁵ He testified that he went to the Dominican Republic for 2 weeks right after his discharge. The General Counsel took off 2 weeks from his gross backpay period to account for his absence from the labor market.

helped out with the housework. She testified that she continuously searched for work but was unsuccessful except for one occasion when she worked for 2 days at a sewing factory and was paid about \$90. As to that, she testified that she was laid off because she didn't have enough experience. She could not recall when this occurred.

The Respondent has not shown that Triunfel failed to search for work, that she had any interim earnings, that she was unavailable for work, or that she otherwise failed to mitigate his damages. I therefore conclude that the Respondent owes her \$7216, plus interest.

IV. PENSION LIABILITY

In the underlying case, I concluded that the Respondent owed certain amounts of money to the Union's pension fund. This is a defined benefit fund where employees for whom contributions are made would be entitled to a pension benefit if they are eligible upon retirement. An employee's eligibility is determined by reaching a designated age and having a minimum number of years during which his employer makes contributions to the fund on the employee's behalf. (Minimum eligibility rules are governed by ERISA.) The amount of the periodic pension payments are determined by the age of the employee at the time of retirement, coupled with the number of years that the person has worked under the plan and has had contributions made on his or her behalf.

The collective-bargaining agreement required the Employer to make payments of \$8-per-week-per employee. As the Respondent ceased making payments to the Pension Fund on January 1, 1993, it owed money to the Pension Fund for all of its covered employees from that date forward. For the period from January 1, 1993, to April 19, 1995, the calculations were based on the total number employees actually employed by the Respondent during that period of time. In the underlying case, I also calculated that the money owed to the Pension Fund after April 19, 2005, should be based on the total number of people actually employed, plus the 22 people who were illegally discharged. This was based on the assumption that this group of 22 would be entitled to reinstatement to their jobs and that they should not suffer any loss in their pension rights by virtue of the illegal action taken against them. (The failure to make payments to the fund on their behalf would affect not only their potential eligibility for pension entitlement but also the amount of the monthly pension benefits that they ultimately would receive.)

I also noted in the underlying case that the Respondent, pursuant to a separate court order, had been making payments of \$3000 per month to the Pension and Welfare Funds and that those moneys had been allocated retroactively to each fund. Of this amount, \$2500 per month was allocated to the Pension Fund and \$500 per month was allocated to the Welfare Fund.

At appendix D of the underlying decision, I attempted to determine the amounts due to the Pension Fund for 1993, 1994, 1995, and the first 2 months of 1996. I (a) calculated the total amount due each week based on the number of employees at \$8 per week; (b) calculated the accrued interest owed on that amount from the date of default until 1996; and (c) reduced that number by subtracting \$2500, which is the amount of pension

allocated money that the Respondent had been paying as a result of a court order. For 1993, the total outstanding debt was \$17,084.40. If we add interest at the rate of 7.8 percent, the total for 1993 would be \$18,417. For 1994, the total outstanding debt was \$19,267.60 and if we add interest at 7.8 percent, the total would be \$20,770. For 1995, and factoring in the additional 22 employees who were illegally discharged on April 19, 1995, the total outstanding debt was \$18,302.40. Adding interest at 7.8 percent gives a total of \$19,730. And for the first 2 months of 1996, the total which included the 22 discriminatees, was \$3,682.80. That was where we left off when I issued the decision in September 1996; albeit the clock was still running.

The court did not seem to have any problem with the general way that the pension fund liability was calculated except in two important respects. First, the court assumed that there would have come a time when the potato-packaging machine would inevitably have been dismantled for legitimate economic reasons. And second, the court was not happy with the interest rate imposed.

On first blush, it may be obvious that if there came a time when operation of the potato-packaging machine would have terminated, then 22 people would not be needed and would not likely be employed after that point.²⁶ As the pension liability is based on the total number of people actually employed, it therefore should be based on the total number of people, including discriminatees, *only* for the time that they would have been employed but for the discrimination. The question is how to determine when the machine would have been dismantled in the absence of discriminatory motivation.

I have already described why I have agreed with the General Counsel's conclusion that the Respondent most likely would have dismantled the potato packing machine, for legitimate reasons, no earlier than January 31, 1996. Therefore, I conclude that up until January 31, 1996, the pension liability should be based on the total number of employees actually working during any specific week, *plus* the 22 discriminatees. After that date, the pension liability should be based only on the total number of workers actually working during any given week.

Since I have concluded that the potato-packaging machine would not have been dismantled until January 31, 1996, I have included the 22 discriminatees into the pension liability formula for the period from April 19, 1995, to January 31, 1996. There is, therefore, no need to recalculate the numbers in appendix D of the underlying decision as those numbers were based on the number of employees who worked *or should have worked* at the facility until January 31, 1996. Therefore, the total amount due to the Pension fund for all of 1995 would be \$18,302.40, plus interest. And the amount due for January 1996 would be \$2,418.40, plus interest.

It is acknowledged that from July 1995 through December 1995, the Respondent made seven payments of \$3000 per

²⁶ Of course this does not automatically follow. The Respondent could have expanded other aspects of his business and could have employed these 22 people in other jobs.

month for a total of \$21,000.²⁷ Since \$2500 per month should be allocated to the Pension Fund, the Respondent, in my opinion, is entitled to a credit of \$17,500 based on this set of payments. It also was acknowledged that in 1996, the Respondent made eleven payments of \$3000 between February and November 1996 and an additional lump sum payment of \$70,216. The total amount paid in 1996 was \$103,216. Of this, 83.3 percent should be allocated to the Pension Fund for a credit of \$85,789.

If we then allocate the combined credit of \$106,789 to the money and accrued interest²⁸ owed as calculated in appendix D of the earlier decision, we arrive at zero for 1993, zero for 1994, zero for 1995, and zero for the first 2 months of 1996. Indeed, if we add up all of the pension debt in schedule D (for 1993, 1994, 1995, and part of 1996), and add an annual interest at the rate of 7.8 percent (instead of 18 percent), the amount would be \$18,417, plus \$20,770, plus \$19,730, plus \$3970, or a total of \$62,887. *That means we have \$43,902 left over.*

For this proceeding, the General Counsel calculated that the pension money owed after February 1, 1996, should be based only on the number of workers actually employed after that date during any given week. Thus, from that date forward, the General Counsel did not add the 22 discriminatees to the calculations.

One problem is that although there were payroll records available for the years 1997 through 2005, there were insufficient records for 1996. Here is how the General Counsel calculated the pension liability for 1996. For January, she added the 22 discriminatees to the number of people actually employed and arrived at 85 employees. At \$8 per week, she calculated that the pension liability was \$680 per week during January. For February, she calculated that there were 62 people working and that the weekly pension liability was \$480. For March and April, she assumed that there would have been 60 people employed. And for the remainder of the year, there were records which showed that the Respondent employed anywhere from a low of 52 employees in a given week to a high of 63 workers during a given week. Mostly, there were 58 to 61 employees working at the facility at any given time.

For 1996, the General Counsel arrived at a figure of \$25,952 and if one adds interest at 7.8 percent, the total pension debt for that year would be \$27,976. But since there still is \$43,902 in reserve, this means that the pension liability for 1996 would be zero.

For 1997, the General Counsel had payroll records and calculated the total pension liability at \$24,112. With interest at

7.8 percent, the total would be \$25,993. Since we still have \$15,926 in reserve, the pension liability for 1997 would be \$10,967, plus interest.²⁹

For 1998, the General Counsel calculated the pension liability as \$23,864. Since we have already offset all of the Respondent's payments made in 1995 and 1996, \$24,864, plus interest is the outstanding liability.

For 1999, the Respondent's liability for pension payments is \$23,320, plus interest.

For 2000, the Respondent's liability for pension payments is \$12,104, plus interest.

For 2001, the Respondent's liability for pension payments is \$19,744, plus interest.

For 2002, the Respondent's liability for pension payments is \$16,824, plus interest.

For 2003, the Respondent's liability for pension payments is \$17,976, plus interest.

For 2004, the Respondent's liability for pension payments is \$19,766, plus interest.

For 2005, the Respondent's liability for pension payments is \$17,515, plus interest.

Because there is no evidence to suggest that the Respondent has resumed making Pension Fund contributions as required by the contract that it is legally obligated to sign (and which automatically renewed itself), and as there is no indication that the Respondent and the Union have reached an impasse in bargaining, the pension liability continues. Accordingly, the issuance of this decision and Recommended Order cannot limit any future claims by the General Counsel for any additional money that may be owed to the Pension Fund.

As noted above, the court remanded this case to determine an appropriate rate of interest. The General Counsel called Diane Gleave, an actuary, to testify about this subject.

There are a multiplicity of interest rates that are used in our society. The Federal Funds rate is set by the Federal Reserve and this usually sets the basis for other short-term interest rates. States and municipalities usually auction their bonds and notes and obtain interest rates that are somewhat lower than corresponding Federal rates because interest on municipal bonds are typically free from State and/or Federal income taxes. Certificates of Deposit offered to customers are usually higher than corresponding Federal or State bonds because private banks are not governmental agencies and are therefore not completely free from risk. Commercial banks set prime interest rates for the most credit worthy enterprises and set higher lending rates for those businesses that are not quite so financially sound. Home mortgage rates are typically set at a somewhat lower rate than auto loan rates, perhaps because it is assumed (and the market place confirms), that people will more likely default on their auto loans before they default on their home loans. Many

²⁷ I am going to assume that the Respondent continued making the \$3000-per-month payments to the funds pursuant to the separate court order. On that assumption, I have concluded that 83.3 percent went to the Pension Fund and the remainder went to the Welfare Fund.

²⁸ In the underlying case, I calculated accrued interest in a somewhat confusing formula. I did this because each \$3000 monthly payment went toward a debt owed 30 months before and interest accrued during the intervening time. However, the interest rate used at that time was 18-percent per year and that is far too high. Without making a new set of calculations, it seems to me that the payments in 1995 and 1996 should not only wipe out the principle of the debts for at least some period of time, but should also wipe out any further accrued interest.

²⁹ Since the \$15,926 would cover the pension debt in 1997 up to the middle of September, interest should not commence until that time. For all years after 1997, the General Counsel has calculated the pension debt by each month during the year. It seems reasonable to me that in all cases, interest on the debt should begin at the point that the moneys were not paid when due. Presumably that would be at the end of each month.

people consider credit card rates to approach usury. But these too are based on calculating the risks of default.

In the present case, Gleave used none of these considerations. Instead, her testimony was used to establish the gain (or loss) in the net investment value of the monies collected by the Pension Fund during each yearly period from 1993 to 2005.

The Pension Fund receives money from employers who contribute on behalf of employees covered by collective-bargaining agreements with the Union. That money is then used to make a variety of investments in the expectation that, over time, the pot will increase and there will be sufficient money in the pot to pay the promised pension payments to employees when they retire. To accomplish this goal, the fund makes a variety of investments. Some investments like bonds will yield interest and others like stocks may provide dividends and perhaps some appreciation in value. It is easy and objective to measure the Fund's income from dividends and interest and it is not difficult to objectively measure increases (or losses) in net asset value for investments made in publicly traded securities. Some investments, such as those in real estate may be a little more subjective.

In any event, Gleave reviewed the fund's audited financial statements for the years 1993 to the end of 2005 and calculating the returns on the fund's investments, essentially averaged the returns to get an average yearly return of 7.8 percent for that entire time period of time. As this seems to be a reasonable way to calculate how much return the funds would have generated from the moneys that should have been paid by the Respondent during the relevant period of time, I will accept this rate.

V. DENTAL AND OPTICAL EXPENSES

In the underlying decision, the Order required the Respondent to make continuing payments to the Union's Welfare Fund. In this proceeding, the General Counsel is limiting her claim to reimbursement only of the actual out of pocket expenses incurred by employees who would have been covered by the collective-bargaining agreement for the period from March 1, 1996, to the time that the employee left the Respondent's employ.³⁰ Apparently the date of March 1, 1996, was chosen because before that date, the Welfare Fund was still providing benefits to the Respondent's employees. But after that date, the fund, because of the failure of the Respondent to make the required contributions, no longer provided benefits to the Respondent's employees.

A. Nancy Amparo

Nancy Amparo purchased eyeglasses from Cohen's Fashion Optical in 2001 and 2005. At that time, she was still employed

by the Respondent and but for the Respondent's failure to make Welfare contributions, she would have been entitled to \$50 for the lenses bought in 2001 and \$40 for the lenses bought in 2005. As for the frames, Amparo would only have been entitled to a \$14 credit for the frames she bought in 2001, and \$40 for the frames she purchased in 2005. (In 2005, Amparo purchased frames that were covered by the plan whereas the frames she bought in 2001 were outside the designer category in the plan's coverage and were reimbursed only to the extent of \$14.)

Based on the above, I conclude that the Respondent owes Amparo the sum of \$144 for her out-of-pocket optical expenses.

B. Ramona Escaboza

Ramona Escaboza presented a "patient history report" that showed various dental procedures she underwent from April 14, 2001, to October 12, 2004. These included fillings, a root canal, and extractions. The total billing for these procedures was \$420. Based on the dental plan from the Union's Welfare Fund, Esther Morales determined that under that plan, Escaboza would have been reimbursed a total of \$160.

Escaboza also purchased eyeglasses in 2000 from Lens Lab Express. The amount on the bill was \$350 but she could not say how much was for the lenses and how much for the frame. The compliance employee called Cohen Optical and was notified that bifocal lenses cost \$80. Morales also called Lens Lab and spoke to a person who said that although she didn't know what bifocal lenses cost in 2000, the current price was between \$120 and \$200. Based on the Welfare Fund's optical benefit in 2000, bifocal lenses were fully covered and shell frames were covered to the extent of \$125. The General Counsel, taking the lowest number for bifocal lenses, makes a claim of \$80 for the lenses and \$125 for the frames.

Based on the above, I conclude that the Respondent owes Escaboza \$160 for her out-of-pocket dental expenses and \$205 for her out-of-pocket optical expenses.

C. Nicholas Ramos

Nicholas Ramos was employed by the Respondent until September 23, 2005. Ramos testified that he had dental work done in 2002 and 2004 by a Dr. Pascal. However, he did not have any bills or receipts to support this claim and he testified that when he went to the office, the dentist was no longer there and could not be located. He testified that in 2002, he paid \$350 for a cleaning, an extraction and a lower removable bridge. Ramos also testified that in 2004 he paid \$400 for an examination, a cleaning, two extractions and a removable bridge. (Apparently this was to replace the first bridge.) In any event, these amounts seem to me to be quite low and if Ramos was intent on fabricating these costs, he could have claimed a lot more.

For the dental expenses incurred in 2002, the General Counsel asserts that under the Welfare Plan, the dental benefit would have reimbursed Ramos \$125 for the bridge, \$50 for the extraction, and \$25 for the cleaning. For dental expenses in 2004, the General Counsel claims that Ramos would have been reimbursed \$125 for the bridge, \$100 for two extractions, \$25 for the cleaning, and \$15 for the extra examination.

³⁰ As noted in the original decision, the Respondent had agreed to a new collective-bargaining agreement but had refused to execute it. Therefore, the terms and conditions of that agreement (including the obligation to make welfare fund payments, continued in effect notwithstanding the Respondent's failure to sign the contract. Also, in accordance with standard precedent, the terms and conditions of the agreement would have continued in effect even after the contract's expiration date until such time as the parties entered into a new agreement or reached an impasse. *Alexander Painting, Inc.*, 344 NLRB 1346 (2005).

Based on the above, I will agree with the General Counsel's claim that Ramos is owed a total of \$465 for his out-of-pockets dental expenses.

D. Thelma Severino

During the time that Thelma Severino was employed, she went to the Dominican Republic in September 1996 where she had teeth extracted and a full set of dentures made. Severino testified and produced a bill showing that she paid 20,000 Dominican pesos. This equals \$1400 American dollars.

In 2004, Severino also had dental work done in Queens, New York, in order to replace the dentures. She paid \$1500 for those services.

The General Counsel asserts that but for the failure to make the Welfare contributions, Severino could have had the 1996 dental work done by the fund's in-house dentist and therefore it would not have cost her anything at all. However, for the expenses incurred in 2004, the General Counsel asserts that Severino would have been reimbursed \$525 for the dentures.

Severino also testified that she purchased eyeglasses in the Dominican Republic in 1996 and 2001. She was, however, unable to secure a receipt for those purchases. As to the 1996 purchase, Severino recalled that she spent 700 Dominican pesos or \$49 and the General Counsel asserts that as this amount for glasses would have been covered under the plan, she is entitled to reimbursement of \$49. For the 2001 purchase, which was the equivalent of \$200, the General Counsel posits that Severino should be reimbursed \$50 for the lenses and \$125 for the plastic frames.

Based on the above, I conclude that the Respondent owes Severino \$1925 for her out-of-pocket dental expenses. I also conclude that the Respondent owes her \$224.

On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended³¹

ORDER

The Respondent, G&T Terminal Packaging Co., Inc. and Mr. Sprout Inc., Tray Wrap Inc., and Chain Trucking, Inc., as single employer and G&T Terminal Packaging Co., Inc., and its alter ego, Slow Pack, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall make payments in the manner described below, with interest.

³¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The backpay amounts for lost pay are as follows:

Sabrina Cabrera	\$4,464
Antonio Castillo	14,700
Marcos Delgado	14,834
German Diaz	13,010
Erlinda Espinoza	13,200
Maria Garcia (Now Carmen Dominguez)	67,936
Mercedes Garcia	8,712
Ana Hernandez	13,200
Estate of Casimiro Hernandez	15,540
Denny Lopez	16,950
Primitivo Lopez	15,330
Leonardo Morel	6,630
Beatriz Olivo	7,216
Benita Olivo	7,216
Juana Olivo	7,216
Jose Rafael Ortega	7,216
Carlos Santana	13,480
Claudio Santiago	13,480
Leyda Triunfel de Nelson	7,216

The amounts due the Pension Fund are as follows:

For 1997	\$10,967
For 1998	24,864
For 1999	23,320
For 2000	12,104
For 2001	19,744
For 2002	16,824
For 2003	17,976
For 2004	19,766
For 2005	17,515

The amounts due for unreimbursed dental and optical expenses are as follows:

Nancy Amparo	\$ 144
Ramona Escaboza	365
Nicholas Ramos	465
Thelma Severino	2,149

IT IS FURTHER ORDERED that nothing contained in this decision and Order shall preclude the General Counsel from issuing a new backpay specification and notice of hearing regarding (a) any backpay claimed for Matilda Rodriguez and (b) any monies owed to the Pension Fund after 2005.

Dated Washington, D.C. October 19, 2006.